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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

FRANK J. ANDREWS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

GUS POSTELL and WILLARD WHITLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETER A. ANDREWS, JR., LOUIS TYE, and FRANK D. ANDRIOLA,
Petitioners,

vs.

UNITED STATES OF AMERICA.

WALTER OWENS and RUSSELL A. MALONE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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In the

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No. 607

FRANK J. ANDREWS,

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No. 707

WALTER OWENS and RUSSELL A. MALONE,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR REHEARING

OPINION BELOW

The opinion of the Court of Appeals is reported at 347 F. 2d 207.

The respective Petitions for a Writ of Certiorari were denied by this Court on December 13, 1965.

Petitioners in each of the above cases respectfully pray this Court to reconsider its denial of said petitions, and to now grant them.

Reserving and relying upon the grounds set forth in the respective Petitions as originally filed, petitioners request a rehearing because:

1. The sworn admission by several jurors that they read newspaper articles throughout the trial, which fact has been ascertained by petitioners since the denial by this Court of the Petitions for a Writ of Certiorari, gives substance to the claim by petitioners that the repeated refusal of the trial court to examine the jurors during the trial to ascertain whether they had read such newspaper articles, as requested by counsel for petitioners, was error of a substantial nature.

2. The decision of the Sixth Circuit Court of Appeals upholding the trial court's failure and refusal to examine jurors during the trial to ascertain if they had read newspaper accounts when requested so to do by counsel for petitioners is in conflict with decisions of the Sixth Circuit itself and with decisions of other Circuits holding that it was the duty of the trial court to make such inquiry upon request.

3. The questions raised by petitioners concerning prejudicial newspaper publicity should be deferred and held in abeyance pending decision by this Court in the Sam Sheppard case, being No. 490 on the docket of this Court.

I.

The first issue raised in each of the Petitions for a Writ of Certiorari was the question of prejudicial newspaper publicity and the refusal of the trial court to examine the jury during the trial to ascertain if they had read the newspaper stories and accounts published during the trial.

The jury was not 'locked up' at any time during the lengthy trial lasting 18 court days, or during the three and one-half days of deliberations which followed.

On no less than nine (9) occasions during the trial, counsel for the petitioners brought to the attention of the trial court prejudicial newspaper headlines, some of them referring to matters that had been excluded by the trial court (354a, 483a, 654a, 1249a, 1390a, 1460a-1461a, 1995a-1996a, 2077a-2078a, 2136a-2137a, 2256a-2259a). In each instance counsel requested that the jurors be examined during the trial to ascertain whether they had seen the articles in question. In each instance the judge refused the request, saying on the first few of these occasions that he would not assume that jurors would not heed his admonition not to read about the case in the newspapers (354a-356a, 483a-484a).

On one occasion, the trial court inquired of counsel whether he was able to represent that the jurors had in fact violated the court's admonition, and counsel replied: "No, I do not know that. It would only be determined after we inquired as if *on voir dire*" (1996a).

Since the denial by this Court of the Petitions for a Writ of Certiorari, it has been ascertained that several jurors did read the newspaper articles. (Exhibits A and B). One juror admits he was influenced by what he read. (Exhibit "A").

On December 30, 1965, Harry J. Swing, a juror hearing the case in 1962, gave a statement, in his own handwriting,

under oath, that he had read newspaper articles during the trial, and that he was influenced by what he had read. A photo of this statement, sworn to before a notary public, is attached as Appendix 'A'. Because it is in handwriting, we reprint it for the convenience of this Court:

> "My name is Harry J. Swing and I live at 81 Windingway, Ft. Thomas, Kentucky. I was a member of the jury which convicted Frank Andrews and others in a trial in the Summer of 1962 in the Federal Court in Covington Ky. During the trial a lot appeared in the newspapers about what was going on at the trial and a lot about Mr. Frank Andrews, and the fellows on trial and their past troubles. I read these things in the newspapers during the trial and I know that others on the jury read the newspapers all the time during the trial of Frank Andrews. I know that a lot of times the lawyers would object to certain things and the Judge wouldn't let us hear about these things. But when the jury left the court room, the things that the Judge said we wouldn't hear were printed in the newspapers and I read them. I can truthfully and honestly say that the thing I read in the newspapers about Frank Andrews and the others on trial caused me to believe the worst about the defendants. I remember that remarks was made about these newspapers stories by other jurors during the trial and there were comments made about the newspaper stories during the time we were considering a verdict in the case, after the judge gave us the case to consider. I have made the above statement in my own handwriting and have made it of my own free will without either threat or promise. the above statement is true.
>
> Harry J. Swing.
>
> Sworn and subscribed to before me at 2:25 P. M. this day December 31, 1965. Howard N. Lucas, notary public, Commonwealth of Kentucky at Large. My Commission expires January 25, 1969."

On January 3, 1966, Russell H. Power, another juror hearing the case in 1962, gave a statement, under oath, subscribing his name thereto, stating that there was considerable information in the newspapers about the trial, and that he "could not help read the newspapers, sometimes it was accidental". His statement, attached as Exhibit 'B', is as follows:

> "My name is Russell H. Power, and I reside at 305 West Fourth, Augusta Kentucky. I was a member of the jury which convicted Frank Andrews and others in a trial in the summer of 1962 in the Federal Court in Covington Kentucky. During the trial there was considerable information in the newspapers about the trial and the defendants. I could not help read the newspapers, sometimes it was accidental. I have read the above and it is true. I made the above statement of my own free will without threat or promise.
>
> (SIGNED) Russell H. Power
>
> Sworn and subscribed before me this 3rd day of January 1966. (Signed) Howard N. Lucas Notary Public Commonwealth of Kentucky at large. My commission expires January 25, 1969."

This brings to sharp focus the issue of whether a trial court can refuse to question jurors concerning newspaper articles appearing during the trial, when those articles are claimed to be prejudicial, and when the Court is requested by counsel for petitioners to make such inquiry, simply on the presumption that jurors will heed the admonishment given by the court not to read newspaper articles concerning the trial.

Not a single time, nor in pursuant to any of the many requests made by counsel for petitioners during the trial, did the trial court make an inquiry, although it was ap-

parent that a juror had to be literally "deaf, dumb and blind" not to have seen these articles which bore glaring headlines and captions, in and of themselves prejudicial in nature.

The Sixth Circuit Court of Appeals in *Marson* v. *United States,* 203 F. 2d 904, 911, said that "Upon the showing of appellant's counsel, it was the duty of the court to interrogate the members of the jury to ascertain whether they had seen the newspaper articles and, if so, whether it had created any prejudice in their minds." But, the Sixth Circuit turned a deaf ear to their previous ruling in this case! Additional authorities which have insisted upon the protection prayed for in this cause are:

Briggs v. *U. S.,* 221 2d 636 (1955);
Stone v. *U. S.,* 113 F. 2d 70 (1940);
Marshall v. *U. S.,* 360 U.S. 310.

Except for the ruling now sought to be reviewed, we know of no appellate decision approving the denial of a motion for examination of the jury to ascertain whether any of the jurors had in fact seen the prejudicial publicity. The unanimity with which Federal trial judges throughout the land have made such inquiries even without express request once the existence of improper newspaper comment is made manifest during a trial, demonstrates that, by the concensus of judicial opinion, a generalized admonition not to read about the case in the newspapers is deemed wholly insufficient once the prejudicial accounts have in fact appeared.

In further factual support of the inflammatory and prejudicial nature of the newspaper stories read by some of the jurors of matters completely outside the court record was a headline and story "Ol Bohanan Murder Recalled" a

matter which occurred seven or eight years before the instant trial and a matter upon which no arrest or indictment was ever returned but which the newspaper story during the trial strongly intimated was related to the petitioners then on trial.

The issue here raised is one which affects the sound administration of criminal justice in Federal courts. In the interest of justice, the petitions for writs of certiorari should be granted.

II.

The decision of the Sixth Circuit is in conflict with its own decision in the *Marson* case, 203 F. 2d 904, and with other circuits which have uniformly held that it is the duty of the trial court to make inquiry to ascertain if a juror, during trial, has read prejudicial newspaper accounts.

Representative decisions include *Coopendege* v. *United States,* 272 F. 2d 504 (C. A. D. C.), where the court held inadequate a very generalized inquiry; *United States* v. *Bentvena,* 319 F. 2d 916, 934 (C. A. 2), where a juror who was shown the offending account by his wife but refused to discuss it with her was none the less discharged from the jury; *United States* v. *Vita,* 294 F. 2d 524 (C. A. 2), certiorari denied, 369 U. S. 823, where a juror who admitted reading the prejudicial article was excused and an alternate substituted; *United States* v. *Carlucci,* 288 F. 2d 691, 694-695 (C. A. 3), certiorari denied, 366 U. S. 961, where the judge "meticulously questioned" every juror; *United States* v. *Milanovich,* 303 F. 2d 626, 629-630 (C. A. 4), certiorari denied, 371 U. S. 876, where the court of appeals emphasized the duty of the trial judge to determine whether the prejudicial matter had reached any juror; and *Accardo* v. *United States,* 298 F. 2d 133, 136 (C. A. 7), where the court said that the district judge "should

have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they had discussed the articles with others." In that case, the Seventh Circuit said, in language fully applicable here, that (298 F. 2d at 136) "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions, were inadequate protection."

In numerous other cases involving prejudicial newspaper publicity, the reports show that the trial judge in fact inquired whether the offending articles had been read by the jury. e.g., *United States* v. *Agueci,* 310 F.2d 817, 831-832 (C.A. 2), certiorari denied, 872 U.S. 959; *Cohen* v. *United States,* 297 F.2d 760, 763-764 (C.A. 9), certiorari denied, 369 U.S. 865; *United States* v. *LaBarbera,* 273 F.2d 547 (C.A. 2); *United States* v. *Carruthers,* 152 F. 2d 512 (C. A. 7), certiorari denied, 327 U. S. 787; *Itow* v. *United States,* 223 Fed. 25, 28 (C. A. 9).

The present case which takes a wholly different approach in a situation that recurs again and again throughout a long trial is in clear conflict with decisions of courts in other circuits and accordingly calls for further scrutiny here.

III.

It is respectfully submitted that the entire question concerning prejudicial newspaper publicity and its effect on the administration of criminal justice, more particularly its effect on a person on trial, is one that has plagued the press, the members of the bar of all jurisdictions, the bar associations nationally and of the respective states. It will soon be decided, it is hoped and believed in the *Sam Sheppard* case, being No. 490 on the docket of this Court, certiorari having been granted.

The questions raised by petitioners concerning prejudicial newspaper publicity occurring during the trial should be deferred and held in abeyance pending decision by this Court in the *Sheppard* case.

CONCLUSION

This Petition for Rehearing should be granted, so that the issues presented by the Petitions can be fully briefed and set down for argument on the regular calendar.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is presented in good faith and not for delay.

THOMAS D. HIRSCHFELD

January, 1966.

My name is Harry J. Lewis and I live at 81 Winding Way Ft. Thomas Ky. I was a member of the jury which convicted Frank Andrews and others in a trial in the summer of 1962 in the Federal court in Covington Ky. During the trial a lot appeared in the news papers about what was going on at the trial and a lot about Mr. Frank Andrews, and the fellows on trial and their past troubles. I read these things in the new papers during the trial and I know that others on the jury read the news papers all the time during the trial of Frank Andrews. I know that a lot of times the Lawyers would object to certain things and the judge would order, let us hear about these things. But when the jury left the court room the things that the judge said we couldn't hear were printed in the news papers and I read them. I can truthfully and honestly say that the thing I read in the news papers about Frank Andrews and the others on trial caused me to believe the worst about the defendants. I remember that remarks was made about these news papers stories by other jurors during the trial and there were comments made about the news-paper stores during the time we were considering a verdict in the case, after the judge gave us the case to consider. I have made the above statement in my own hand writing and have made it of my own free will without either threat or promise. The above statement is true. Harry J. Lewis.
Sworn and subscribed before me at 3:25 P.M. this day December 31, 1965 I [illegible] a notary public Commonwealth of Kentucky at Large. My Commission expires January 25, 1969.

EXHIBIT----------A

My name is Russell H. Power, and I reside at 305 West Fourth Augusta Kentucky. I was a member of the jury which convicted Frank Andrus and others in a trial in the summer of 1962 in the Federal Court in Covington Kentucky. During the trial there was considerable information in the newspapers about the trial and the defendants. I could not help read the newspapers, sometime it was accidental. I have read the above and it is true. I made the above statement of my own free will without threat or promise.

Russell H Power. . . Sworn and subscribed before me this 3rd day of January 1966 Howard V. Sacks Notary Public commonwealth of Kentucky at large my commission expires January 25, 1969

EXHIBIT ----------B